Rajinah a/p Sellvagumaran v Arvind a/l Konasakaran

HIGH COURT (IPOH) — ORIGINATING SUMMONS NO AA-24F-28–06 OF 2018
HASHIM HAMZAH J
14 MAY 2019

Civil Procedure — Judgments and orders — Application to set aside — Whether court functus officio — Whether High Court has power to set aside another perfected High Court order

This was the defendant's application before the High Court to set aside an order of another High Court granted pursuant to an application by the plaintiff for custody, care, control and sole guardianship over her child. The plaintiff also prayed for the defendant to be given limited access to the child. The cause paper was served personally to the defendant and he failed to appear for the hearing. The plaintiff was granted order in terms on the same day itself and the said order was already sealed and perfected. The defendant's grounds for application were: (a) the defendant was already granted custody, control, care and sole guardianship over the child vide an order dated 12 October 2016 and therefore the said order was null and void; (b) the said order was obtained fraudulently as the plaintiff had in mala fide suppressed the fact about the existence of the aforementioned order from the court; and (c) the defendant was not made aware of this proceeding and the defendant's signature in the affidavit of service was forged. The plaintiff contends that: (i) the order obtained was regular and all cause papers were in order and the court is now functus officio and cannot set aside its own perfected order; (ii) the plaintiff had no knowledge of the 12 October 2016 order as the plaintiff was outside of Malaysia at the material time; and (iii) since the plaintiff had no knowledge of the order, the issue of material suppression of facts does no arise.

Held, dismissing the application with no order as to cost:

(1) It is trite law that one High Court cannot set aside a final order of another High Court, let alone its own final order. Once the court's judgment or order has been drawn up and perfected, the court is functions officio and has no power to vary, alter or set aside the said judgment or order. One of the exceptions to this was the slip rule to correct clerical mistakes in the judgment or orders, or errors arising therein from any accidental slip or omission (see paras 8–10).

(2) Another exception was where the final judgment of the High Court could be proved to be null and void on ground of illegality or lack of jurisdiction. Section 40 of the Evidence Act 1950 simply render

judgments of the court admissible to support a plea of res judicata and it does not go beyond that. The question of res judicata itself has to be determined under its own principles of law (see paras 12 & 14).

(3) The court found merit in the plaintiff's submission that she did not receive any cause papers and the 12 October 2016 order from the defendant based on the parties' affidavits. The issues raised by the defendant on fraud and alleged falsification of the defendant's signature required viva voce inquiry or trial through a fresh action and ought not to be decided solely based on affidavit evidence (see paras 16 & 19).

[Bahasa Malaysia summary

Ini merupakan permohonan defendan dihadapan Mahkamah Tinggi untuk mengetepikan perintah satu lagi Mahkamah Tinggi yang diberikan selaras dengan satu permohonan oleh plaintif untuk jagaan, pemeliharaan, kawalan dan penjagaan tunggal terhadap anaknya. Plaintif juga memohon agar defendan akses terhadap kepada anak tersebut. Kertas kausa telah diserahkan secara kendiri kepada defendan dan dia gagal untuk hadir sewaktu pendengaran. Plaintif telah diberikan perintah sepertimana dipohon pada hari sama dan perintah tersebut telahpun dimaterai dan disempurnakan. Alasan permohonan defendan adalah: (a) defendan telah diberikan hak jagaan, pemeliharaan, kawalan dan penjagaan tunggal terhadap anak tersebut melalui satu perintah bertarikh 12 Oktober 2016 dan oleh itu perintah terebut adalah tidak sah dan terbatal; (b) perintah tersebut telah diperoleh secara frod memandangkan plaintif telah dengan mala fide menyembunyikan fakta tentang kewujudan perintah yang dinyatakan diatas dari mahkamah; dan (c) defendan tidak dimaklumkan mengenai prosiding ini dan tandatangan defendan dalam afidavit penyerahan telah dipalsukan. Plaintif menegaskan bahawa: (i) perintah yang diperoleh adalah teratur dan semua kertas kausa teratur dan mahkamah kini *functus officio* dan tidak boleh mengetepikan perintahnya yang telah disempurnakan; (ii) plaintif tiada pengetahuan mengenai perintah 12 Oktober 2016 tersebut memandangkan plaintif berada diluar Malaysia pada waktu material; dan (iii) memandangkan plaintif tiada pengetahuan mengenai perintah tersebut, isu penyembunyian fakta material tidak timbul.

Diputuskan, mengetepikan permohonan tanpa perintah kos:

(1) Adalah menjadi undang-undang mantap bahawa satu Mahkamah Tinggi tidak boleh mengetepikan perintah muktamad satu Mahkamah Tinggi yang lain, apatah lagi perintah akhirnya sendiri. Apabila satu perintah atau penghakiman telah disempurnakan, mahkamah adalah functus officio dan tiada lagi kuasa untuk mengubah, menunda atau mengetepikan penghakiman atau perintah tersebut. Satu pengecualian terhadap perkara ini adalah kaedah khilaf untuk membetulkan kekhilafan pengkeranian dalam penghakiman atau perintah, atau

kesilapan yang timbul dari apa-apa ketinggalan atau kesilapan (lihat perenggan 8–10).

(2) Satu lagi pengecualian adalah yang mana penghakiman akhir mahkamah tinggi boleh dibuktikan sebagai terbatal dan tidak sah atas alasan kepenyalahan undang-undang atau ketiadaan bidang kuasa. Seksyen 40 Akta Keterangan 1950 hanya menyebabkan penghakiman mahkamah boleh diterima pakai untuk menyokong satu rayuan res judicata dan ianya tidak melebihi itu. Persoalan res judicata tersebut harus ditentukan dibawah prinsip undang-undangnya sendiri (lihat perenggan 12 & 14).

(3) Mahkamah mendapati wujud merit dalam hujahan dan dia tidak menerima apa-apa kertas kausa dan perintah 12 Oktober 2016 yang mana merupakan asas defendan atas afidavit pihak-pihak. Isu yang ditimbulkan oleh defendan adalah berasaskan frod dan pengataan pemalsuan tandatangan defendan memerlukan inkuiri *viva voce* atau perbicaraan melalui satu tindakan baru dan tidak ditentukan hanya berdasarkan keterangan afidavit (lihat perenggan 16 & 19).]

Cases referred to

Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd [1998] 1 MLJ 393; [1998] 2 CLJ 75, FC (refd)
Hock Hua Bank Bhd v Sahari bin Murid [1981] 1 MLJ 143; [1980] 1 LNS 92, FC (refd)
Suffield and Watts; ex parte Brown, In re (1888) 20 QBD 693, CA (refd)
Scott & English (M) Sdn Bhd v Yung Chen Wood Industries Sdn Bhd [2018] 5 MLJ 204; [2018] 6 CLJ 271, FC (refd)
Serac Asia Sdn Bhd v Sepakat Insurance Brokers Sdn Bhd [2013] 5 MLJ 1; [2013] 6 CLJ 673, FC (refd)
Sungei Biak Tin Mines Ltd v Saw Choo Theng & Anor (No 2) [1970] 2 MLJ 226; [1970] 1 LNS 150, FC (refd)

Legislation referred to

Evidence Act 1950 s 40
Rules of Court 2012 O 7, O 10 r 5, O 20 r 11, O 28, O 28 r 11, O 42 r 13
Rules of the High Court 1980 O 20 r 11

Balakrishna Balaravi Pillai (Krish Mano & Assoc) for the plaintiff.
C Kaladevi a/p Chandrasekharan (Suppiah Palanisamy & Co) for the defendant.

Hashim Hamzah J:

INTRODUCTION

[1] This is the hearing of the defendant's application dated 25 October

2018 ('encl 9') made under O 7, O 28, O 10 r 5 and O 42 r 13 of the Rules of Court 2012 ('the ROC 2012') to set aside an order of this court granted on 30 July 2018 ('the said order').

[2] The said order was granted pursuant to an application by the plaintiff dated 11 June 2018 ('encl 1') for custody, care, control and sole guardianship over her child, Ziona Kashmirah Arvind. The plaintiff also prayed for the defendant ('the plaintiff's husband') to be given limited access to the child.

[3] The cause papers were served personally to the defendant on 26 June 2018 and an affidavit of service was filed on 9 July 2018 to this court (exh R7 in the plaintiff's affidavit in reply affirmed on 21 December 2018).

[4] The case was fixed for hearing on 30 July 2018. The defendant failed to appear on the stipulated date, and the plaintiff was granted order in terms on the same day itself ie the said order. The said order was already sealed and perfected.

[5] On 25 October 2018, the defendant filed this application under encl 9 to set aside the said order.

GROUNDS OF THE DEFENDANT'S APPLICATION IN ENCL 9

[6] In brief, the grounds of the defendant's application were as follows, namely that:

(a) the defendant was already granted custody, control, care and sole guardianship over the child vide an order dated 12 October 2016 given by the Kuala Lumpur High Court in Originating Summons No WA-24F-124–06 of 2016 ('the 12 October 2016 order') (exh AK1 in the defendant's affidavit in support affirmed on 25 October 2018) therefore the said order was null and void as it contravened s 40 of the Evidence Act 1950;

(b) the said order was obtained fraudulently as the plaintiff had, in bad intention (mala fide), suppressed the fact about the existence of the 12 October 2016 order from the court; and

(c) the defendant was not made aware of this proceeding and the defendant's signature in the affidavit of service was forged.

THE PLAINTIFF'S CONTENTION

[7] On the other hand, the plaintiff contended that:

(a) the said order was regularly obtained and the cause papers were in order, therefore the court is now functus officio and cannot set aside its own perfected order;

(b) the plaintiff had no knowledge of the 12 October 2016 order since the plaintiff was outside of Malaysia at the material time; and

(c) since the plaintiff had no knowledge of the 12 October 2016 order, the issue of suppression of material facts did not arise.

FINDINGS

[8] First and foremost, it is trite law that one High Court cannot set aside a final order of another High Court, let alone its own final order (per Gopal Sri Ram JCA (as he then was) in the Federal Court case of *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393 at p 424; [1998] 2 CLJ 75 at p 112).

[9] Once the court's judgment or order has been drawn up and perfected, the court is functus officio and the court has no power to vary, alter or set aside the said judgment or order (see *Sungei Biak Tin Mines Ltd v Saw Choo Theng & Anor (No 2)* [1970] 2 MLJ 226; [1970] 1 LNS 150 (SC) and *In re Suffield and Watts; ex parte Brown* (1888) 20 QBD 693).

[10] One of the exceptions to this rule is the slip rule under O 20 r 11 of the ROC 2012 (in pari materia with O 20 r 11 of the Rules of the High Court 1980) ie to correct clerical mistakes in the judgment or orders, or errors arising therein from any accidental slip or omission. This was mentioned in the Federal Court case of *Hock Hua Bank Bhd v Sahari bin Murid* [1981] 1 MLJ 143; [1980] 1 LNS 92 as follows:

> *Clearly the court has no power under any application in the same action to alter vary or set aside a judgment regularly obtained after it has been entered or an order after it is drawn up, except under the slip rule* in O 28 r 11 of the Rules of the Supreme Court 1957 (O 20 r 11 of the Rules of the High Court 1980) so far as is necessary to correct errors in expressing the intention of the court: *Re St Nazaire Co* 12 Ch D 88, *Kelsey v Doune* [1912] 2 KB 482; *Hession v Jones* [1914] 2 KB 421, unless it is a judgment by default or made in the absence of a party at the trial or hearing. But if a judgment or order has been obtained by fraud or where further evidence which could not possibly have been adduced at the original hearing is forthcoming, a fresh action will lie to impeach the original judgment: *Hip Foong Hong v Neotia & Co* [1918] AC 888 and *Jonesco v Beard* [1930] AC 298. The hearing of the action will in a proper case be expedited: *Smith v Peizer* 65 SJ 607. (Emphasis added.)

[11] Similarly, in another Federal Court case of *Scott & English (M) Sdn Bhd v Yung Chen Wood Industries Sdn Bhd* [2018] 5 MLJ 204; [2018] 6 CLJ 271, Jeffrey Tan FCJ in delivering the judgment of the court held as follows:

A [21] *All litigation must come to an end. The plaintiff could not relitigate the orders of Linton Albert J and Yew Jen Kie JC. We agree with Douglas Cristo Primus Sikayun JC that when the order of Linton Albert J was sealed, the High Court became functus officio, save and except to correct 'clerical mistakes in the judgment or orders, or errors arising therein from any accidental slip or omission'* (see O 20 r 11 of the Rules of Court 2012)
B ... (Emphasis added.)

[12] The Federal Court in *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* also held that another exception is where the final judgment of the High Court could be proved to be null and void on ground of
C illegality or lack of jurisdiction. Through the judgment of Mohd Azmi FCJ (as he then was), it was held as follows:

> It is of course settled law as laid down by the Federal Court in Hock Hua Bank case that one High Court cannot set aside a final order regularly obtained from another
D High Court of concurrent jurisdiction. *But one special exception to this rule (which was not in issue and therefore not discussed in Hock Hua Bank) is where the final judgment of the High Court could be proved to be null and void on ground of illegality or lack of jurisdiction* so as to bring the aggrieved party within the principle laid down by a number of authorities culminating in the Privy Council case of *Isaacs v Robertson* [1985] AC 97 where Lord Diplock while rejecting the legal aspect of
E voidness and voidability in the orders made by a court of unlimited jurisdiction, upheld the existence of a category of orders of the court '... which a person affected by the order is entitled to apply to have set aside ex debito justitiae in the exercise of the inherent jurisdiction of the court, without his needing to have recourse to the rules that deal expressly with proceedings to set aside orders for irregularity, and give
F to the judge a discretion as to the order he will make ...
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> ... For my part, I must hasten to add that apart from breach of rules of natural justice, in any attempt to widen the door of the inherent and discretionary jurisdiction of the Superior Courts to set aside an order of court ex debito justitiae to a category of cases involving orders which contravened 'any written law', *the*
G *contravention should be one which defies a substantive statutory prohibition so as to render the defective order null and void on ground of illegality or lack of jurisdiction*. It should not for instance be applied to a defect in a final order which has contravened a procedural requirement of any written law. The discretion to invoke the inherent jurisdiction should also be exercised judicially in exceptional cases where the defect
H is of such a serious nature that there is a real need to set aside the defective order to enable the court to do justice. In all cases the normal appeal procedure should be adopted to set aside a defective order, unless the aggrieved party could bring himself within the special exception. (Emphasis added.)

I **[13]** With regard to the first ground raised by the defendant ie that the said order was null and void as it contravened s 40 of the Evidence Act 1950, s 40 of the Evidence Act 1950 provides that:

> Section 40 Previous judgments relevant to bar a second suit or trial.
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> The existence of any judgment, order or decree which by law prevents any court

from taking cognizance of a suit or holding a trial is a relevant fact when the question is whether the court ought to take cognizance of the suit or to hold the trial.

[14] However I am of the considered view that this provision merely provides for the relevancy of any judgment of courts to be used as evidence by any parties in any proceedings to bar a second suit or trial, as the Evidence Act 1950 is an act that defines the law of evidence (see Long Title to the Evidence Act 1950). This provision simply renders judgments of the courts admissible to support a plea of res judicata and it does not go beyond that. The question of res judicata in itself has to be determined under its own principles of law.

[15] Therefore, since s 40 of the Evidence Act 1950 is specifically pertaining to the issue on relevancy of evidence, I am of the considered view that it does not amount to any substantive statutory prohibition as defined in *Badiaddin*'s case.

[16] Next, with regards to the issue of whether plaintif have knowledge of the Kuala Lumpur High Court, Originating Summons No WA-24F-124–06 of 2016 and the 12 October 2016 order, I find merit in the plaintiff's submission that she did not receive any cause papers and the 12 October 2016 order from the defendant based on the parties' affidavits that is:

(a) the plaintiff was in New Zealand from July 2015–May 2016. She stayed in Malaysia for approximately one month before going back to New Zealand with her child in June 2016 (paras 6(iii) and 8(i) and exh R6 in the plaintiff's affidavit in reply affirmed on 21 December 2018), a fact which was admitted by the defendant (para 15(ix) of the defendant's affidavit in support affirmed on 25 October 2018);

(b) the plaintiff and the defendant was occasionally in communication through phone and emails during this time (para 8(i) and exh R6 in the plaintiff's affidavit in reply affirmed on 21 December 2018) a fact which was also admitted by the defendant (paras 15(xii) and 17 of the defendant's affidavit in support affirmed on 25 October 2018); and

(c) the plaintiff averred that even though they were occasionally in communication, the defendant never mentioned about the proceedings and the 12 October 2016 order. In fact, there was neither any averment from the defendant that he had informed the plaintiff about the proceeding nor any proof of service of the cause papers and the 12 October 2016 order to the plaintiff exhibited by the defendant in his affidavit.

[17] It is also pertinent at this juncture to note that the defendant claimed that he was not served with the cause papers and the said order by the plaintiff in the present case. However, it can be seen that the address of service of all the cause papers and the said order was the same as the address affirmed by the defendant himself in the first paragraph of his affidavit in support affirmed on 25 October 2018 ie No 16, Jalan Seri Cheras 11, Taman Seri Cheras, Batu 9, Jalan Cheras 43200 Cheras, Selangor Darul Ehsan.

[18] As regards to the defendant's allegation of fraud and the alleged falsification of the defendant's signature and other disputed issues raised by both the plaintiff and the defendant, I can do no better than to quote the passage of Gopal Sri Ram JCA's judgment (as he then was) in the Federal Court case of *Serac Asia Sdn Bhd v Sepakat Insurance Brokers Sdn Bhd* [2013] 5 MLJ 1; [2013] 6 CLJ 673 as follows:

> [38] Fraud on the court is obviously a serious allegation. It requires that higher standard of proof, one of beyond a reasonable doubt. In *Jonesco v Beard* [1930] AC 298 (HL), Lord Buckmaster observed that 'fraud is an insidious disease, and if clearly proved to have been used so that it might deceive the court, spreads to infect the whole body of the judgment'. The qualifying phrase 'if clearly proved' to us governs the manner on how fraud should be proved. In *Chee Pok Choy & Ors v Scotch Leasing Sdn Bhd* [2001] 2 CLJ 321, *it was held that a judgment may be impeached only for a 'deliberate fraud practiced upon the court' and that it is 'insufficient to show that a litigant merely convinced the court through misleading or erroneous evidence'* (see the *Australian case of Price v Stone* [1964] VR 106). It has been otherwise described as 'cheating to get an advantage'. Thus, to us, there is a need for a fresh action to adjudicate the issue.
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> [39] *The courts below found fraud based on the allegation that there had been a misrepresentation of fact by the appellant in its suit. But, as stated earlier, this so-called misrepresentation or suppression of evidence viz as to the ownership of the Cessna aircraft is a disputed issue. And it requires a viva voce inquiry rather than determination merely by way of affidavit evidence. That would be the only safe and proper procedure to determine such a serious allegation which in this case was fervently disputed ...* (Emphasis added.)

[19] Therefore, I am of the considered opinion that in the paramount interest of justice, the issues raised by the defendant in the present case requires a viva voce inquiry or trial through a fresh action and ought not to be decided solely based on affidavit evidence. As it is now, this court is functus officio and would not set aside its own perfected order.

CONCLUSION

[20] For reasons enumerated above, the defendant's application in encl 9 is therefore dismissed with no order as to cost.

Application dismissed with no order as to cost.

Reported by Izzat Fauzan